92-231

Supreme Court, U.S.
FILED
JUL 31 1992
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

COMMUNITIES, INC.;
DULWORTH & RIVES, INC. PETITIONERS

v.

JAMES B. BUSEY, Administrator,
Federal Aviation Administration;
FEDERAL AVIATION ADMINISTRATION RESPONDENTS

AND

COMMUNITIES, INC. PETITIONER

v.

SAMUEL K. SKINNER, Secretary of the
United States, Department of
Transportation; UNITED STATES
DEPARTMENT OF TRANSPORTATION RESPONDENTS

REGIONAL AIRPORT AUTHORITY OF
LOUISVILLE AND JEFFERSON
COUNTY, KENTUCKY INTERVENOR-RESPONDENTS

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

*W. Henry Graddy IV
Robert E. Reeves
Todd Evan Leatherman
REEVES & GRADDY
110 North Court Street
P. O. Box 88
Versailles, KY 40383
(606) 873-1340

*Counsel of Record

ATTORNEYS FOR PETITIONERS

QUESTIONS PRESENTED

1. Does Section 4(f) of the Department of Transportation Act as interpreted by the Supreme Court permit a court to affirm FAA approval of a transportation project that destroys certain park and historic resources and constructively uses others, where the record indicates there are one or more alternatives that meet transportation needs, cost less, disrupt the community less and destroy no 4(f) resources?

2. Does Section 4(f) of the Department of Transportation Act as interpreted by the Supreme Court permit the Secretary of the Department of Transportation to reject the "no-build" alternative without determining whether not building the project will be "imprudent"? Supreme Court review is requested to resolve a conflict in the Circuit Courts of Appeal.

3. Was the FAA arbitrary and capricious not to supplement its FEIS following the Kentucky Supreme Court decision in Prestonia and following agreement with EPA to do single event noise analysis?

4. Does the record before this Court reflect sufficient factual basis for the agency conclusions to satisfy the "hard look" requirement of NEPA as enunciated in Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989)?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINION BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, OR REGULATIONS INVOLVED.....	3
STATEMENT OF THE CASE.....	3
REASONS FOR GRANTING THE WRIT.....	3
CONCLUSION	62
APPENDIX	*Separate Volume*

TABLE OF AUTHORITIES

Page

Cases

Allison v. Department of Transp., 908 F.2d 1024 (D.C. Cir. 1990)..... 35-37

Andrus v. Sierra Club, 442 U.S. 347 (1979).....49,51,57

Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87 (1983).....51,53,58

Bowen v. American Hosp. Ass'n., 476 U.S. 610 (1986)..... 53

Cannon v. University of Chicago, 441 U.S. 677 (1979)..... 15

Citizen Advocates for Responsible Expansion, Inc. (I-CARE) v. Dole, 770 F.2d 423 (5th Cir. 1985) 14,33

Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190 (D.C. Cir. 1991)..... 35

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971)..... *Passim*

Druid Hills Civic Ass'n v. Federal Highway Admin., 772 F.2d 700, 713 (11th Cir. 1985)...34,42-44

Hickory Neighborhood Defense League v. Skinner, 910 F.2d 159 (4th Cir. 1990)..... 42

Historic Preservation Guild of Bay View v. Burnley, 896 F.2d 985 (6th Cir. 1989)..... 55,56

Industrial Union Dep't, AFL-CIO v. American Petroleum Inst. (Benzene), 448 U.S. 607 (1980)..... 53

Lake Hefner Open Space Alliance v. Dole, 871 F.2d 943 (10th Cir. 1989)..... 42,44

Louisiana Envtl. Soc'y Inc. v. Coleman (LES II), 537 F.2d 79, 84 (5th Cir. 1976).....20,42-43

Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989).....47-52,57-59

Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766 (1983)..... 51

Miles v. Apey Marine Corp., ___ U.S. ___, 111 S.Ct. 317, 325 (1990)..... 15

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983)..... 54

Prestonia Area Neighborhood Ass'n v. Abramson, Ky., 797 S.W.2d 708 (1990)..... 10

Ringsred v. Dole, 828 F.2d 1300 (8th Cir. 1987)..... 42,44

Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989).....9,45-48, 51,58,61

Sierra Club v. United States Dep't of Transp., 753 F.2d 120 (D.C. Cir. 1985)..... 37

Stop H-3 Ass'n v. Dole, 740 F.2d 1442, 1461 (9th Cir. 1984) cert. denied, 471 U.S. 1108 (1985)..... 30,32,40,43-44

TVA v. Hill, 437 U.S. 153 (1978)..... 49,57

Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, Inc., 435 U.S. 519 (1978)..... 11,60

Statutes, Rules and Regulations:

Administrative Procedural Act, 5 U.S.C. §706..... 51-52

Airport and Airway Development Act of 1970, 49 U.S.C. §1701, et. seq..... 14

Airport and Airway Improvement Act ("AAIA") of 1982, 49 U.S.C. §2208(b)(5)..... 14,15

Department of Transportation Act, Section 4(f), 49 U.S.C. §303(c)..... *Passim*
49 U.S.C. §1653(f)..... 13

Federal-Aid Highway Act, 23 U.S.C. §138..... 13

Kentucky Constitution, Section 2..... 10

National Environmental Policy Act, 42 U.S.C. §4321..... *Passim*

Other Authority:

Federal Aviation Administration, Order 5050.4A Airport Environmental Handbook ¶ 83 (Oct. 8, 1985)..... 14

Federal Aviation Administration, Order 5200.5 FAA Guidance Concerning Sanitary Landfills On or Near Airports ¶¶ 3, 5 (Oct 16, 1974)..... 26,28

Harvard Environmental Law Review,
Volume II, Number 2, 1987..... 52
Volume 16, Number 1, 1992..... 50

Trial Magazine,
October, 1991..... 62

20 Environmental Law 551 (1990)..... 51

40 CFR §1502.9(c)..... 49,59

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

COMMUNITIES, INC.;
DULWORTH & RIVES, INC. PETITIONERS

v.

JAMES B. BUSEY, Administrator,
Federal Aviation Administration;
FEDERAL AVIATION ADMINISTRATION RESPONDENTS

AND

COMMUNITIES, INC. PETITIONER

v.

SAMUEL K. SKINNER, Secretary of the
United States, Department of
Transportation; UNITED STATES
DEPARTMENT OF TRANSPORTATION RESPONDENTS

REGIONAL AIRPORT AUTHORITY OF
LOUISVILLE AND JEFFERSON
COUNTY, KENTUCKY INTERVENOR-RESPONDENTS

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Communities, Inc. and Dulworth & Rives, Inc. Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit,

affirming the approval by the Secretary of Transportation of the Louisville Airport Improvement Plan ("LAIP").

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported as Communities, Inc., et al. v. James B. Busey, Admin., et al., 1992 U.S.App. 6210 (6th Cir. 1992).

JURISDICTION

Judgment and the opinion of the court were entered February 13, 1992. The Court of Appeals denied Petitioners' Petition for Rehearing by Order entered April 3, 1992. Petitioners filed a petition pursuant to Supreme Court Rule 13.06 for extension of time within which to file this petition, which extension was granted by Order of the Supreme Court on July 1, 1992. Jurisdiction is sought under 28 U.S.C. 1254(1). Jurisdiction in the Court of Appeals was based on 49 U.S.C. §1486 and 28 U.S.C. §1631.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- The National Environmental Policy Act of 1969, Section 102, 42 U.S.C. §4332, in relevant part.
- Title 49 U.S.C. §303, in relevant part.
- The Airport and Airway Improvement Act, 49 U.S.C. §2208, in relevant part.
- United States Department of Transportation, Federal Aviation Administration, Order 5050.4A Airport Environmental Handbook ¶ 83 (Oct. 8, 1985), in relevant part.

The pertinent text of these provisions is contained in the Appendix, A-39 through A-43.

STATEMENT OF THE CASE

This litigation presents the Supreme Court with a dispute between an agency of the federal government (Federal Aviation Administration, hereinafter "FAA") supported by a local quasi-governmental agency (Regional Airport Authority of Louisville and

Jefferson County, Kentucky, hereinafter "RAA") on the one hand, and citizens, businesses and property owners (including two small municipalities) who have been and will be affected by the governmental decisions on the other hand. The project giving rise to this conflict is the proposed expansion of Standiford Field (SDF) in Louisville, Kentucky. Like all such conflicts, there is the potential for parochial self-interest on the part of the citizens, and there is also the potential for arbitrary and capricious action on behalf of the government, meaning here the manipulation of data and reliance on conclusory analysis to justify a preordained course of action, and the lack of good faith, both in affording fair process and an opportunity to be heard, and in consideration of the information of record.

There is also the potential that the governmental agencies acted in good faith based on the best information available to

them at the time of their decision, but that they ended their analysis too soon because they perceived a need to prevent an airline passenger capacity crisis before it happened. And, there is also the potential that those citizens and businesses who have not yet been displaced and those historic and park resources not yet demolished as well as those citizens and businesses who now anticipate new significant noise impacts and those currently unaffected parks, historic resources and wildlife resources that today anticipate significant adverse noise impacts may be spared such demolition and such impacts.

The proposed expansion of Standiford Field was originally touted as necessary to meet projected airline passenger needs based on a consultant's analysis of passenger enplanements for three years - 1985, 1986, and 1987, which the consultant used to justify projecting increased passenger growth

at the rate of eight percent per year, projecting passenger enplanements in 1990 to reach 1,370,000 and capacity problems for the year 1992 based on projections of 274 arrivals and 274 departures each day. In fact, passenger enplanements have remained flat in Louisville for a twenty-year period with 1990 enplanements actually being 1,041,784, less than the 1987 passenger enplanements. The U.S. Court of Appeals for the Sixth Circuit recognized that the project was no longer touted as an airline passenger project. At the time of oral argument in September, 1991, its proponents conceded the project to be simply an airline cargo project. Communities, Inc. v. Busey, Opinion at 3.

However, even the record of airline cargo operations, when subjected to the required "hard look" does not support the FAA conclusion that the expansion is needed. The most current evidence of record shows that

air cargo operations peaked in 1985 at 36,260 and dropped to 31,400 in 1987. It is very intriguing that this data is not presented in the final environmental impact statement (EIS) published in 1990. Instead, the EIS "estimated" that 1987 cargo operations would be 37,450.[1]

Petitioners' brief to the Court of Appeals cited the most recent data of total aircraft operations which revealed that in January-February 1991, operations were averaging 230 arrivals and 230 departures each day. Petitioners' Court of Appeals Brief, Addendum, B-4. Petitioners attach hereto at Appendix A-45 the most recent data as of this date, which reveals that in April-May 1992 the total operations, including air cargo, averaged 215 arrivals and 215 departures each day.

It is one thing for municipal boosters

---

[1] Petitioners' Court of Appeals Reply Brief Addendum R-1.

to "puff" up the community pride with rosy projections about future growth. However, when these projections become a tool to destroy people's homes, businesses, churches and schools, as well as parks and historic resources, the judicial process must intervene to help distill real community needs from puffing. The Court of Appeals helped this distillation but did not complete the "careful and searching" inquiry.

An even more egregious manipulation of data occurred in the agency evaluation of social, economic, land use and cultural resource effects of the LAIP. When the RAA consultant began to evaluate alternatives, the early analysis revealed that Alternative 5C (which became the LAIP) would destroy 1,420 homes, relocating 3,450 residents. In comparison, Alternative 3E would destroy 289 dwellings, relocating 795 residents and Alternative 4 would destroy 332 dwellings, relocating 1000 residents. Only Alternative

5C would demolish 16 existing churches. See Appendix A-47.

Under the "hard look" mandate of Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989), the public and the FAA should have carefully evaluated "irreversible and irretrievable commitments of resources which would be involved in the proposed action...." 42 U.S.C. §4332(C)(iv).

Instead, the FAA accepted the RAA suggestion to categorize the "Dislocation of 1,440 +/- dwelling units, 3,500 +/- persons, 15 churches and 60+ businesses as part of the "No Action Alternative" in the EIS because this would result from the City's use of its "urban renewal" authority. As a result the "additional" dislocations caused by the LAIP artificially appeared to be minimal, a mere 150 homes, one more church and 40+ businesses. EIS, Table 1-1.[2]

---

[2] Note that Table 1-1 continues to refer to the urban renewal program even though the Kentucky Supreme Court had earlier decided in

Petitioners requested the FAA to supplement the final Environmental Impact Statement once the "urban renewal" sham was reversed by the Kentucky Supreme Court in Prestonia Area Neighborhood Association v. Abramson, Ky., 797 S.W.2d 708 (1990). The Court found in Prestonia that the City of Louisville's declaration that three neighborhoods slated for demolition to make room for the airport expansion as "blighted" was unsupported by substantial evidence, and an arbitrary use of governmental authority in violation of Kentucky Constitution § 2.

Petitioners also requested the FAA to supplement the EIS after single event noise data was revealed for the first time in the final EIS and the FAA declined. This data, included at EPA's insistence, showed dramatic noise increases in previously relatively

---

Prestonia Area Neighborhood Association v. Abramson, Ky., 797 S.W.2d 708 (1990), that urban renewal authority could not be used for the demolition of these neighborhoods.

quiet areas including several historic residential districts.

The Petitioners have vigorously questioned the need for and purpose of the airport expansion to alert the FAA of their concerns as required by Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, Inc., 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978). However, Petitioners have never had the opportunity to judicially "test" the claims of the RAA as accepted by the FAA. Petitioners have challenged the agency evaluation of alternatives, but have not had the opportunity to question the RAA consultant's evaluation of these alternatives.

Petitioners sought to proceed against the Secretary of Transportation in U.S. District Court in order to be able to introduce evidence and to cross-examine ("test") the evidence relied upon by the FAA. But this action was dismissed for lack of

jurisdiction.

Petitioners' only hearing to date has been the original action before the U.S. Court of Appeals for the Sixth Circuit. That court accepted Petitioners' argument that the expansion of the airport could not be justified based on passenger enplanements but rejected Petitioners' argument that the evidence of air cargo operations was also inadequate to justify expansion of the airport at this time. Petitioners now seek a "careful and searching" inquiry into the evidence of need for additional capacity, a determination by this Court that serious questions of Department of Transportation Act Section 4(f) and National Environmental Policy Act ("NEPA") compliance have been raised justifying consideration by the Supreme Court. Petitioners seek a determination by this Court that the FAA should reopen the NEPA and 4(f) inquiry to re-examine the alternatives in order to meet

the real airline needs for Louisville without unnecessary impact on citizens, businesses, parks, historic resources, and wildlife resources that are proximate to Standiford Field.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS CANNOT BE RECONCILED WITH THE REQUIREMENTS OF SECTION 4(f) OF THE DEPARTMENT OF TRANSPORTATION ACT AS INTERPRETED BY THE U.S. SUPREME COURT IN CITIZENS TO PRESERVE OVERTON PARK v. VOLPE.

In 1966, Congress adopted the Department of Transportation Act which contained at Section 4(f) a congressional mandate concerning the protection of public parks, recreational areas, wildlife or waterfowl refuges and historic sites of national, state or local significance, which mandate has become known as the Section 4(f) mandate. 82 Stat. 824, 49 U.S.C. Section 1653(f). In 1968, Congress enacted the Federal-Aid Highway Act of 1968, 82 Stat. 823, 23 U.S.C. Section 138, which Act contained at Section

18(a) language virtually identical to the Section 4(f) language referenced above. These two sections, Section 4(f) of the Department of Transportation Act of 1966 and Section 18(a) of the Federal-Aid Highway Act of 1968 were interpreted in Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

The law governing airport expansion appears in the Airport and Airway Improvement Act of 1982. This Act was originally enacted as the Airport and Airway Development Act of 1970. When Congress reenacted the law in 1982, Congress provided at Section 10(d) a requirement of "no feasible and prudent alternative" that closely parallels the original Section 4(f) requirement and that has been interpreted by the FAA to require an equivalent analysis. FAA Order 5050.4A ¶ 83b, c, d. This requirement appears at 49 U.S.C. Section 2208(b)(5) in the Airport and Airway Improvement Act of 1982.

Congress has spoken concerning limits to the discretion of the Secretary of Transportation acting through the FAA to approve airport expansion plans. This directive has been interpreted by the United States Supreme Court and Congress has subsequently reaffirmed the original directive given to the agency. The Congressional reaffirmation of the statutory requirements as enunciated by this Court in the Overton Park decision must therefore guide the public, governmental agencies and this court's interpretation of the legal significance of facts presented to determine compliance with these referenced statutes. Miles v. Apey Marine Corp., ___ U.S. ___, 111 S.Ct. 317, 325 (1990); Cannon v. University of Chicago, 441 U.S. 677 (1979).

Section 4(f) of the Department of Transportation Act provides "clear and specific directives" to the Secretary of Transportation, in this case acting through

the FAA. Overton Park, 401 U.S. at 411. The Secretary's decision will be set aside if the court determines that it is arbitrary, capricious or an abuse of discretion. 401 U.S. at 416. To determine whether the Secretary has abused his discretion, a reviewing court must make three determinations:

1. Whether the Secretary acted within the scope of his authority and "whether on the facts the Secretary's decision can reasonably be said to be within that range." Id. at 415-16.

2. Because Section 4(f) prohibits the "use" of park land or historic resources if feasible and prudent alternatives are available, "the reviewing court must be able to find that the Secretary could have reasonably believed that...there are no feasible alternatives or that alternatives do involve unique problems." Id. at 416.

3. If the Secretary acted within his

scope of authority, the reviewing court must consider whether the Secretary's decision "was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Id.

The factual inquiry by the reviewing court is to be "searching and careful" although the standard of review is "narrow." Id.

Although the Secretary acknowledged that his authority to approve the use of 4(f) properties was prohibited if feasible and prudent alternatives were available, Petitioners maintain that the Secretary's finding that no such alternatives exist was unreasonable and was an abuse of his discretion. The decision reflects a failure to consider all relevant factors in the record before the agency and is a clear error of judgment.

In the EIS and Record of Decision (ROD) the FAA concedes that the proposed action

would use protected 4(f) resources: (1) The James Lowell Elementary School will be demolished; (2) Grove Park will be taken and Highland Park Community Center will be demolished; (3) The historic residence at 2111 South Park Road and 20 buildings on the University of Louisville Belknap Campus located within the 65 Ldn noise contour will be used; (4) 11 other unnamed potential historic sites also located within the 65 Ldn contour will be used. EIS 1-19, JA 3549.[3]

The FAA considered other runway

---

[3] Petitioners have maintained that the above list of 4(f) properties omits a substantial number of additional 4(f) protected resources including the 1700 properties located within the Old Louisville Historic District and Central Park that will be constructively "used" by noise (50 flights a day and 11 flights a night greater than 80 db - comparable to a diesel truck at 50 feet) generated by the LAIP. Petitioners have maintained that the record evidence that noise levels at the Falls of the Ohio Wildlife Refuge will double also constituted constructive "use" of this resource. However, the FAA's exclusion of these additional properties does not effect the answer to the first 4(f) inquiry.

configurations but made no finding that the other configurations would use 4(f) protected resources, nor made a record from which such a finding may be inferred. The record identifies no 4(f) resources which will be used by any of the structural alternatives. However, the record clearly reflects that the LAIP will displace park land and demolish historic buildings.

The Court of Appeals accepted the conclusion that Alternative 4 would "result in almost all flights passing over noise sensitive areas immediately east and west of the airfield." Residential properties are noise sensitive. The airport is surrounded by residential properties so any configuration will ultimately fly over noise sensitive areas.[4]

---

[4] However, a careful review of Alternative 4 superimposed over an aerial photograph in "Working Paper #1" at JA 814 reveals that there are no residential properties immediately to the east or west of the proposed runway. On the east is the cloverleaf of I-65 and the Outer Loop highway

Frankly, it appears that the Court of Appeals erroneously equated the term "noise sensitive areas" with "4(f) resources". See Opinion at page 12, where the Court after discussing "noise sensitive areas" states: "Thus Petitioners fall far short of suggesting a feasible alternative that would not use 4(f) resources." In fact, the two terms and their legal significance are very different. With noise sensitive use, such as residential use, one option is acquisition of the property and relocation of the residents to another quieter location. But with 4(f) resources such as park lands or historic resources, acquisition and relocation are not appropriate remedies. With 4(f) resources the project is required to be designed to avoid or minimize the use.[5] Critical to any

---

and on the west are industrial properties including the CSX observation house in the middle of a railyard.

[5] See Louisiana Environmental Society Inc. v. Coleman (LES II), 537 F.2d 79, 84 (5th Cir. 1976), "If there is another way,

court's analysis of agency compliance with 4(f) obligations is the analysis of the impact of alternatives on the protected 4(f) resources. **THERE IS NO EVIDENCE IN THE RECORD BEFORE THIS COURT THAT ALTERNATIVE 3E OR ALTERNATIVE 4 WILL USE ANY 4(f) PROTECTED RESOURCES.**

As to "feasibility", the Secretary concluded that some of the alternatives imposed "severe engineering requirements," however, no alternative was found to be incapable of being built as a matter of sound engineering, and the severe engineering requirements involved (relocation of industrial buildings) are also necessary to the construction of the LAIP. The other requirements mentioned, relocation or overpass construction for rail tracks and drainage ditches, are regularly employed in major constructions projects. The best indicator of engineering feasibility is cost.

---

take it."

The record reflects cost was estimated using standard engineering cost estimate techniques. The cost of Alternate 4 is one-half of the LAIP and the cost of Alternate 3E is within 3% of the LAIP.

Although the record contains no evidence of "infeasibility", no evidence that any of the alternatives would use 4(f) resources, and no evidence that any of the alternatives involve disruptions of the community of the magnitude of the LAIP, the Court of Appeals' decision in this case concluded that there was a basis for the FAA finding that some alternatives were infeasible, and that some alternatives were imprudent, generally lumping all of the reasons together and referring to "the enormous record evidence on feasibility" which the Court of Appeals stated Petitioners ignored. Court of Appeals Decision, page 17.

Petitioners attached to their Petition for Rehearing the complete text of the

evaluation of Alternatives 3E and 4 in Technical Report 2 (JA 614 to 710) to demonstrate that no such "enormous record on feasibility" exists. In fact, the record completely lacks any hard evidence upon which the Secretary could have reasonably relied to support his conclusion that the alternatives are either infeasible, imprudent or result in the "use" of 4(f) resources.

In Overton Park the Supreme Court stated that Section 4(f)'s language "is a plain and explicit bar to the use of federal funds for construction of highways through parks - only the most unusual situations are exempted." Id. at 411.

The FAA was not presented with an unusual situation. The problems involved in implementing Alternatives 3E and 4 are typical of major construction.

Overton Park requires that 4(f) protected resources not "be lost unless there are truly unusual factors present in a

particular case or the cost or community disruption resulting from alternative routes reaches extraordinary magnitudes". Id. at 413.

The Court of Appeals' specific consideration of alternatives appears beginning at page 11 of the Opinion. The Court erroneously stated that the Petitioners failed to propose an alternative that would not use 4(f) resources. In fact, the Alternatives 1, 2A, 3E and 4 all are described as not displacing park resources. The LAIP, Alternative 5C, is the only alternative that the RAA studies indicate will displace or demolish 4(f) protected resources.

The Court of Appeals accepted the FAA conclusion that Alternative 4 is "extremely inefficient". What facts support this conclusion? Using the record described above as a reference, Alternative 4 cannot reasonably be rejected as imprudent.

Alternative 4 and the LAIP would generate equal increases in hourly capacity (to 108 maximum VFR operations, and 104 maximum IFR operations), equal annual service volume (313,000 aircraft operations), and identical aircraft delay numbers. Alternative 4 is identified as having no impacts on Section 4(f) properties (parks and archeological sites), as costing approximately $141 million, and as requiring the relocation of 332 residences, 1,000 persons, no churches, and 48 businesses.[6] In contrast, Alternative 5C (the LAIP alternative), is described as affecting several Section 4(f) properties, as costing $284 million, and as requiring the relocation of 1,420 residences, 3,420 persons, 16 churches and 102 businesses. Id. Further, Alternative 4 would utilize property which is already

---

[6] Technical Report No. 3 at Table S-1, "Effects of Alternatives: Second-Level Screening." Court of Appeals Joint Appendix 000786.

generally zoned for industrial use, whereas Alternative 5C requires the rezoning of a significant amount of property from residential to industrial uses. Id.

Based on these comparisons alone, Alternative 4 has all of the benefits of Alternative 5C, with much less of an impact on sensitive resources and half of the cost. However, the EIS inexplicably and cavalierly rejects Alternative 4 with a brief two sentence paragraph: "Alternative 4 would be extremely inefficient and require closure of the Outer Loop landfill, which serves Jefferson County and five surrounding counties. Therefore, it was rejected."

The reasoning of this paragraph is grossly inadequate as a basis for rejecting an alternative. The closing of a landfill required for Alternative 4 is a reason to prefer, not to reject the alternative. FAA Guidance encourages the closing of landfills near airports. FAA Order 5200.5 (Oct. 16,

1974), provides as follows:

> "Various studies and observations have resulted in the conclusion that sanitary landfills are artificial attractants to birds. Accordingly, landfills located in the vicinity of an airport may be incompatible with safe flight operations. Those conditions that are not compatible must be eliminated, to the extent practicable.
>
> * * *
>
> Sanitary landfills will be considered as an incompatible use if located within areas established for the airport through the application of the following criteria:
>
> a. Landfills located within 10,000 feet of any runway used or planned to be used by turbojet aircraft.
>
> * * *
>
> d. Any landfill located such that it places the runways and/or approach and departure patterns of an airport between bird feeding, water or roosting areas.[7]

---

[7] U.S. Dep't of Transp., Fed. Aviation Admin., Order 5200.5, FAA Guidance Concerning Sanitary Landfills On or Near Airports ¶¶ 3, 5 (Oct. 16, 1974). At oral argument, in response to a question from Judge Jones, counsel for the RAA for the first time

The second basis for rejecting Alternative 4, as described in the EIS, is that the alternative would be "extremely inefficient". Without more description, one may assume that the inefficiency inherent in Alternative 4 is that it would fail to satisfy fully the purpose of the proposed project. The purpose of the project, as articulated in this working paper (i.e. to provide improved passenger capacity at Standiford Field) is entirely different from the purpose of the project as articulated in the EIS and announced at oral argument, "This is a cargo project." Since UPS facilities are located at the south end of the airport property and since inefficiency for cargo operations has different parameters than passenger traffic inefficiency, it is obvious

---

acknowledged that the life of the Outer Loop landfill may be as short as six years. This fact, which does not appear elsewhere in the record, is highly relevant to the feasibility of Alternative 4, but was revealed only after questioning from the court.

that the FAA did not examine the efficiency of Alternative 4. Alternative 4 is not imprudent when compared to the LAIP since it would aid in separating cargo and passenger operations, would aid in reducing operational costs for UPS, would reduce capital costs for the airport, and would likely allow operational flexibility which the LAIP precludes by removing the landfill hazard. In conclusion, the reasons provided in the EIS for rejecting Alternative 4 do not rise to the level of making it not practicable or infeasible or imprudent. See map at Appendix A-48 with LAIP, Alternative 3E and Alternative 4 displayed to illustrate.

Regarding the "prudence" of the alternatives, the Court of Appeals concluded by simply accepting the FAA assertion that unique problems exist, but the Court failed to identify what the unique problems are. The court stated that the alternatives "would not accomplish the goal of increasing

capacity at SDF". Opinion at page 17. But this conclusion is not supported by the evidence. All of the structural configurations increased capacity and Alternative 4 equals the capacity of the LAIP.

Petitioners have questioned the claims that the operations at SDF are growing at such a rate that the airport will exceed capacity by 1992. See discussion above at pages 5-8.

Where the evidence of need for additional capacity is as unpersuasive as presented here, the FAA cannot reasonably find the "no-build" alternative (or the "no-build until needed" alternative) to be an imprudent alternative to the use of 4(f) protected resources. In Stop H-3 Association v. Dole, 740 F.2d 1442 (9th Cir. 1984), the court required the Secretary to reanalyze the no-build alternative where population growth predicted in the EIS as justification for a

highway did not occur.

The "clear and specific" directives of Section 4(f) as enunciated by the Court in Overton Park requires the following:

WHERE THERE IS AN ALTERNATIVE AIRPORT CONFIGURATION THAT PROVIDES THE TRANSPORTATION CAPACITY THE FAA DEEMS AS NEEDED AND IT COSTS MUCH LESS AND DISRUPTS A MUCH SMALLER PORTION OF THE COMMUNITY AND THAT ALTERNATIVE WILL USE NO 4(f) PROPERTIES, THE FAA IS FLATLY PROHIBITED AS A MATTER OF LAW FROM APPROVING AND SPENDING FEDERAL MONIES ON A PROJECT THAT USES 4(f) PROPERTIES. This is the mandate of the law as described in Overton Park and this mandate cannot be reconciled with the decision of the Court of Appeals in this proceeding.

The Sixth Circuit's 4(f) analysis in this case stands in clear contrast to the detailed analysis required by Overton Park as evidenced by the numerous decisions by other circuit courts.

In Stop H-3 Association v. Dole, supra., the Ninth Circuit reviewed a highway project that would use two park lands. The court exhaustively reviewed two alternatives, a realignment and the no-build alternative, Id. at 1450-1458. Applying the "stringent" Overton Park standards, the court rejected DOT's claims that the alternatives were infeasible or imprudent. Id. at 1455. The court's eight page analysis reflects the probing, in-depth review of the DOT's 4(f) statement that Overton Park mandates. Of particular note is the court's rejection of DOT's finding that the no-build alternative was imprudent. The court accepted that there was a "need" for the project, but dismissed the agency's claim that the no-build alternative would result in disruptions of such a magnitude that the 4(f) resources should be sacrificed.

In Citizen Advocates for Responsible Expansion, Inc. (I-CARE) v. Dole, 770 F.2d

423 (5th Cir. 1985) (involving the widening of a highway in Ft. Worth), the Fifth Circuit reiterated that the court was required to conduct "a thorough, probing, in depth review." Id. at 441, citing Overton Park, 401 U.S. at 415. In that case, the court's focus was on the agency's claim that the project would not use the 4(f) resource. In finding the record in that case inadequate, the court stated:

> While the administrative record supporting the Negative Declaration need not possess the same detail or clarity as an EIS and may, in part, be informal, mere perfunctory or conclusory language will not be deemed to constitute an adequate record and cannot serve to support the agency's decision not to prepare an EIS.

The record in this case, like the record in I-CARE, contains no analysis that supports the conclusion that Alternative 3E and Alternative 4 cannot be built as a matter of sound engineering or that the cost or community disruption of implementing either would reach extraordinary magnitudes. In

comparison to the LAIP they are far less disruptive. The Court of Appeals opinion to the contrary, page 11, Petitioners argued below that both Alternative 3E and the no-build alternative, as well as Alternative 4, were prudent and feasible alternatives on the record before the agency. The Court of Appeals opinion completely omits specific reference to these alternatives.

In Druid Hills Civic Ass'n v. Federal Highway Admin., 772 F.2d 700 (11th Cir. 1985), the Eleventh Circuit rejected the FHA's 4(f) analysis of alternatives after it reviewed the record and found that there was no meaningful assessment of the impacts on 4(f) properties associated with each alternative. Id. at 717.

Like that case, the record before this Court does not provide the "predicate facts on which to make a reasonable judgment" in that there is no record evidence that Alternative 3E, Alternative 4 and no-build

alternative will use 4(f) resources.

The recent airport cases also reflect a careful, in depth analysis of effects on 4(f) properties comparing the proposed action with alternatives. In Citizens Against Burlington, Inc. v. Busey, et al., 938 F.2d 190 (D.C. Cir. 1991), Justice Thomas discussed the meaning of the "prudent" requirement in 4(f) analysis, noting that, "second, contrary to the FAA's argument, the case law uniformly holds that an alternative is imprudent under Section 4(f)(1) if it does not meet the transportation needs of a project." Id. at 203. (Emphasis in original). The focus suggested by Justice Thomas on transportation needs as a measure of the prudence of an alternative is lacking in this Court's Opinion. Both Alternative 3E and Alternative 4 increase operational capacity at comparable costs. Both must be determined "prudent".

In Allison v. Department of

Transportation, 908 F.2d 1024 (D.C. Cir. 1990) involving the new Denver airport, the court conducted a probing review of the airport's impact on Barr Lake State Park, a wildlife refuge, and rejected the agency's use of noise guidelines designated to measure the impact on humans in assessing whether the park's "natural attributes" would be significantly impaired by noise from the new airport. Id. at 1028-1029. The court declined to find a "use" because noise from the proposed airport actually decreased when compared to existing airport noise impacts, but its review of the impacts on the natural attributes of the 4(f) resource indicate a proper application of the Overton Park standard of review. More importantly, there the record permitted the court to compare 4(f) impacts.

In contrast, the Court of Appeals in this proceeding failed to assess the impacts of Alternatives 3E and 4 on 4(f) properties

correctly. It appeared to equate all "noise sensitive areas" with 4(f) properties and failed to address the FAA's improper analysis of the noise impact on the Falls of the Ohio Wildlife Refuge using the same guidelines rejected by the D.C. Circuit in Allison. Nowhere in the record does the FAA state that Alternatives 3E and 4 will result in the "use" of 4(f) resources. The Court's conclusion to the contrary is not supported in the record.

The court in Sierra Club v. United States Department of Transportation, 753 F.2d 120 (D.C. Cir. 1985) also conducted the appropriate inquiry into the impact of transportation projects on 4(f) resources in the context of increased noise. The D.C. Circuit assessed the increase in noise within the 4(f) resource (Grand Teton National Park), and found that the increase in noise in the park to be so marginal (1 dB on average) that no "use" occurred. On the

record before it, that Court was able to compare the noise impact on the protected 4(f) resource from the proposed activity to the alternative.

In contrast, the record before the Supreme Court does not permit such comparison because there is no noise analysis of the alternative configurations.

In conclusion, the level of review afforded by the Court of Appeals falls far short of the probing, in depth review of the FAA's conclusions required by Section 4(f) under Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971). Certiorari should be granted to obtain the proper implementation of Department of Transportation Act Section 4(f) requirements in a manner consistent among the circuits and in conformity with the express requirements of Overton Park.

II. THE COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI TO RESOLVE A CONFLICT WITHIN THE CIRCUITS.

Petitioners maintain that the Secretary's decision to approve the construction of the LAIP violates Section 4(f) because the Secretary could not have reasonably believed that there were no prudent and feasible alternatives. The EIS contains a description of five alternative configurations, the LAIP (Alternative 5C) and four others. However, only the LAIP and the "no build" alternative are analyzed in the EIS in terms of their effect on the environment.

The Secretary rejected as not feasible or imprudent two alternatives, the no-build alternative and Alternative 3E, primarily for the stated reason that these alternatives would not meet the transportation goals of

the project - increasing airside capacity at SDF.[8]

The Court of Appeals upheld this determination that alternatives which do not fulfill the agency's stated purpose or goal are ipso facto "imprudent" under Section 4(f). Opinion, page 17.

This holding is in conflict with Overton Park as explained in the decision of the Ninth Circuit Court of Appeals in Stop H-3 Association v. Dole, 740 F.2d 1442 (9th Cir. 1984) which requires that the no-build alternative may not automatically be rejected as imprudent simply by claiming that it will not fulfill the transportation goals of the project. In that case the Court of Appeals remanded the decision back to the Secretary to determine whether the no-build alternative was imprudent. The court rejected the Secretary's conclusions that the additional

---

[8] See discussion above concerning actual operational data and questionable need for additional capacity at pages 5-8.

cost, increased congestion, or projected commuter delays would cause "unique problems" or result in costs of an "extraordinary magnitude" making the alternative "imprudent" under §4(f). The Ninth Circuit gave no indication that a mere showing of need for the project was sufficient justification for concluding that not to build the project would be imprudent. To equate "need" with prudence weakens the protection which Congress intended to provide 4(f) resources. As this Court recognized in Overton Park, more is required for an alternative to be rejected as imprudent than a showing of need. "It is obvious that in most cases consideration of cost, directness of route, and community disruption will indicate that park land should be used for highway construction whenever possible." Id. at 411-412.

Other circuits taking the opposite position include the Fourth, Fifth, Eighth,

Tenth and Eleventh Circuits. See Hickory Neighborhood Defense League v. Skinner, 910 F.2d 159 (4th Cir. 1990); Louisiana Environmental Society, Inc. v. Coleman (LES II), 537 F.2d 79 (5th Cir. 1976); Ringsred v. Dole, 828 F.2d 1300 (8th Cir. 1987); Lake Hefner Open Space Alliance v. Dole, 871 F.2d 943 (10th Cir. 1989); Druid Hills Civic Ass'n. v. Federal Highway Admin., 772 F.2d 700 (11th Cir. 1985).

The first case taking the position that a highway project not meeting the "transportation goals" of the project was the old Fifth Circuit's decision in Louisiana Environmental Society, Inc. v. Coleman, supra, involving the construction of a bridge across Cross Lake as part of a circumferential highway project. Without explanation, the court accepted the agency's conclusion that alternatives including the no-build alternative were imprudent "because they failed to fulfill the needed purpose of

a circumferential highway route." 537 F.2d at 85.

Following the Stop H-3 decision, the issue of the Secretary's obligation to consider the prudence of the no-build alternative was next considered by the Eleventh Circuit in Druid Hills Civic Ass'n v. Federal Highway Admin., supra. The Eleventh Circuit noted the conflict between the Stop H-3 decision and the Fifth Circuit's LES II decision but declined to join the Ninth Circuit in recognizing the Secretary's obligation to consider the prudence of no-build, citing the binding precedent of LES II. "Even were we to agree that Stop H-3 offers a view more consistent with Overton Park, we would still be bound by our decision in LES II." 772 F.2d at 716, n. 18.

Other circuits considering the application of the "prudence" test to alternatives that don't expressly meet the transportation goals of a project have simply

concluded without discussion that such alternatives are imprudent per se. Ringsred v. Dole; Lake Hefner. Of the circuits considering the issue, only the Ninth Circuit's Stop H-3 decision can fairly be read as a true attempt to determine whether there is a requirement under Section 4(f) to apply the Overton Park "prudence" test to the no-build alternative or an alternative which does not meet the transportation goals of the agency. The other circuits have simply followed the Druid Hills decision without addressing the issue. Supreme Court guidance is needed to reaffirm this requirement and to bring these other circuits into line with the correct interpretation as announced in Stop H-3.

III. THE FAA FAILED TO PERFORM ITS PROCEDURAL AND SUBSTANTIVE OBLIGATIONS UNDER NEPA, IN LIGHT OF RECENT SUPREME COURT INTERPRETATION OF THAT LAW.

The past decisions of this Court issued for the purpose of restraint of judicial

activism and in furtherance of the goal of appropriate deference to agency expertise must not be allowed to be misconstrued into a "blank check" approval of anything that the agency offers so long as lip service is given to the required legal conclusions.

The Supreme Court in Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 109 S.Ct. 1835 (1989) was asked to review a decision by the Ninth Circuit Court of Appeals that concluded that NEPA imposed a substantive duty on agencies to mitigate adverse environmental effects and a duty to prepare a worst case analysis. The Supreme Court disagreed with the reasoning of the Ninth Circuit, reaffirming the procedural and investigatory nature of NEPA and the courts' reliance on agency deference on matters that are highly technical. The Robertson Court declined to require a worst case analysis where the record reflected agency reliance upon computer projections that were believed

to be appropriately conservative. Having reached these conclusions the Supreme Court restated the fundamental purpose of NEPA:

> "The statutory requirement that a federal agency contemplating a major action prepare such an environmental impact statement serves NEPA's 'action forcing' purpose in two important ways...It ensures that the agency, in reaching its decision, will have available and will carefully consider detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.
>
> Simply by focusing the agency's attention on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the dye otherwise casted." Id. at 1845.

The Robertson court recognized that NEPA, when it is properly implemented, serves to provide the public "assurance that the agency 'has indeed considered environmental concerns in its decisionmaking process.'"

Id. at 1845.

The Robertson court also recognized that, "Implicit in NEPA's demand...is an understanding that the EIS will discuss the extent to which adverse effects can be avoided." Id. at 1846.

In a companion case decided with Robertson, Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 109 S.Ct. 1851 (1989) the Supreme Court reviewed another decision of the Ninth Circuit Court of Appeals regarding the obligation of an agency to prepare a supplemental EIS. The Supreme Court reversed the Court of Appeals and found that a supplemental EIS was not necessary, clarifying that the standard for review would be whether or not the agency decision to prepare a supplemental EIS was arbitrary and capricious. The Supreme Court again determined that the factual questions presented involved disputed scientific issues, an area within the expertise of the

agency and exercised its discretion not to substitute its judgment for that of the agency.

However, the Marsh opinion does recognize an obligation to prepare supplemental environmental impact statements even though the Court observed that such requirement is not expressly provided within the law. Id. at 1857. The Court cited legal writers to the effect that such supplemental statements may at times be necessary to satisfy the Act's "action-forcing" purpose. The Marsh court cited language closely paralleling the language in the Robertson decision as follows:

> "Rather, NEPA promotes its sweeping commitment to 'prevent or eliminate damage to the environment and biosphere' by focusing government and public attention on the environmental effects of the proposed agency action. 42 U.S.C. Section 4321. By so focusing agency attention, NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct."

The court cited its earlier decision TVA v. Hill, 437 U.S. 153 (1978) as authority which recognizes that at some point NEPA becomes inapplicable but that up to that point in time, "NEPA cases have generally required agencies to file environmental impact statements when the remaining governmental action would be environmentally 'significant'". The Marsh decision cited with approval the regulations of the Counsel on Environmental Quality at 40 CFR § 1502.9(c) and cited Andrus v. Sierra Club, 442 U.S. 347, 99 S.Ct. 2335 (1979) as imposing a duty on all federal agencies to prepare supplements to either draft or final Environmental Impact Statements if there "are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." The Marsh decision supports both the "rule of reason" concerning the decision of the agency to supplement and the NEPA

requirement that agencies take a "hard look" at the environmental effects of their planned action even after a proposal has received initial approval. Id. at 1859.

The Marsh court applied the Overton Park standard of review restating that the reviewing courts inquiry must be "searching and careful." The court seemed to recognize that an agency decision not to supplement based on the agency interest in finality must trigger a careful review of the record, or judicial review will be rendered meaningless. Id. at 1861.

Some commentators have observed that when NEPA gets to the Supreme Court, the environmentalists always lose.[9] See David C. Shilton "Is the Supreme Court Hostile To NEPA? Some Possible Explanations for a 12-0

---

[9] See Philip Michael Ferester, "Revitalizing the National Environmental Policy Act: Substantive Law Adaptations From NEPA's Progeny", The Harvard Environmental Law Review, Volume 16, Number 1, p. 207 (1992).

Record.", 20 Environmental Law 551 (1990). After raising the possibility that the Supreme Court is "hostile" to the Act this writer concludes that such interpretation is not correct. The writer notes that the decisions of Marsh and Robertson, discussed above, as well as the decision of Metropolitan Edison v. People Against Nuclear Energy, 460 U.S. 766 (1983), Baltimore Gas & Electric Co. v. NRDC, 462 U.S. 87 (1983) and other prior decisions should more accurately be interpreted as reflecting this Court's intention that NEPA accomplish its stated purpose but that its purpose not be expanded from procedural and investigative into substantive obligations, that its focus on actual environmental effects be maintained[10] and that it be interpreted in a manner consistent with the Administrative Procedure

---

[10] Rejecting invitations to extend NEPA to appropriation decisions, Andrus, supra, or to psychological health damage, Metropolitan, supra.

Act (APA). Marsh, supra, at 1860 citing APA 5 U.S.C. §706. Nevertheless, this writer's premise raises issues of concern. The 12-0 record of the government before the Supreme Court may tend to self-fulfilling or inadequate agency analysis based on the belief by the agency that it will not be required to provide the factual justification for its conclusions.[11] Based on this risk, it is critical that the Supreme Court look again at this law. In those cases where the Supreme Court has recognized the need for the courts to take a "searching and careful" inquiry into the facts offered in support of

---

[11] See Andrew D. Siegel, "The Aftermath of Baltimore Gas & Electric Co. v. NRDC: A Broader Notion of Judicial Deference to Agency Expertise" The Harvard Environmental Law Review, Volume II, Number 2, 1987. This writer predicts that, "If the Federal courts continue to follow Baltimore Gas and defer mechanically to the technical decisions of expert agencies, the agencies will recognize this trend and pattern their decisionmaking accordingly, characterizing important and controversial factual and policy determinations as predictions laden with scientific uncertainty." Id. at page 380.

the agency NEPA conclusions, such discussion occurs as dicta. It is now time for the Supreme Court to provide agency instruction that a "hard look" means exactly that.

Petitioners do not seek substitution of a judicial determination in place of an agency determination of technical questions such as the proper method of noise measurement or the safety of airport configurations. Baltimore Gas & Electric Co. v. NRDC, 462 U.S. 87 (1983).

Petitioners seek a judicial determination whether the underlying facts of record provide adequate support for the agency conclusions. See Industrial Union Department, AFL-CIO v. American Petroleum Institute (Benzene), 448 U.S. 607 (1980) holding that the OSHA conclusion to lower standard for airborne concentrations of benzene from 10 ppm to 1 ppm was not supported by appropriate findings. See Bowen v. American Hospital Association, 476 U.S.

610 (1986) holding that Health and Human Services regulations regarding health care for handicapped children were not supported with adequate agency rationale and factual basis to withstand hospital challenge. See Motor Vehicle Mfrs. Assn. v. State Farm Mut., 463 U.S. 29 (1983), holding that Secretary of Transportation rescission of passive restraint requirement was arbitrary and capricious where agency failed to provide an adequate basis and explanation for rescinding the requirement.

In the following areas, Petitioners believe that a "searching and careful" inquiry into the factual basis of the FAA decision will require the Supreme Court to conclude that the agency reached a decision that is arbitrary and capricious.

A. The "Urban Renewal" Sham.

The FAA analysis of major environmental impacts from the airport expansion is fundamentally skewed in assessing land use,

social, socio-economic, water quality, other cultural resources and solid waste impacts because of the FAA's continued embrace of the "urban renewal" sham depiction of the destruction of the Highland Park and Standiford neighborhoods as resulting from the "no action" alternative. See EIS, Table 1-1. The Court of Appeals rejected Petitioners' argument, reasoning that the FAA had performed an environmental analysis of these land acquisitions and even if the FAA did not perform such analysis, such land acquisitions had independent utility citing Historic Preservation Guild of Bay View v. Burnley, 896 F.2d 985 (6th Cir. 1989). The Court of Appeals has misapplied the requirements of NEPA. Doing an environmental analysis (assuming one was done) that the agency mischaracterizes as resulting from "no action" does not help the agency or the public take a "hard look" at the consequences of the proposed action. Such

mischaracterization actually disguises the real effect of the proposed agency action. As such, the essential purpose of NEPA is defeated by such mischaracterization.

The Court of Appeals reliance upon Historic Preservation Guild of Bay View v. Burnley is likewise misplaced. See Footnote 36 in Petitioners' Brief to the Court of Appeals, enumerating repeated descriptions of the "urban renewal" project as part of the proposal to build Alternative 5C, the LAIP. There is no evidence in the record of this action that a land acquisition program of this magnitude would be necessary for any other structural alternative. This record does not support application of the "independent utility" exception of Burnley. The proper question is not whether the project has independent utility but whether it was appropriately labeled part of the no action alternative.

The Court of Appeals declined to

consider the standing issue that could be raised upon withdrawal of the Prestonia, Highland Park and Standiford Neighborhood Associations as Petitioners. Opinion, footnote 1 and footnote 2. However, settlement by these entities does not end the need to complete a proper NEPA analysis of the land use, social, socio-economic and cultural resources that remain today but are likely to be affected by the airport expansion. Through this date, there is ongoing litigation by the businesses Louisville Forge and Gear, Louisville Glove and 42 other entities including the Highland Park Business and Enterprise Association opposing the RAA efforts to condemn their properties. See Petitioners Supplement to Record dated July 30, 1992. Marsh, supra, TVA v. Hill, supra, and Andrus, supra, require remand to the FAA with instructions to supplement the EIS with the destruction of the Highland Park and Standiford

neighborhoods and the elimination of businesses including Louisville Forge and Gear and Louisville Glove properly evaluated as resulting from the LAIP expansion proposal.

B. Single Event Noise

Petitioners concede that the measurement of noise impacts is the type of technical evaluation that requires courts defer to agency expertise. Baltimore Gas, supra, Robertson, supra, and Marsh, supra. However, in this case there are two agencies with expertise, the FAA and the Environmental Protection Agency (EPA), and they have disagreed concerning the proper method to evaluate the environmental impacts of noise. The Court of Appeals noted this disagreement which resulted in the Toledo agreement that the FAA would do additional single event noise analysis for certain airports including Louisville. Opinion, page 8. The FAA subsequently added single event noise data in

the final EIS but did no sleep and speech disturbance analysis as requested by EPA and failed to provide an opportunity for public comment on this new data. The FAA failure to reopen for comment resulted in an EPA letter submitted post-EIS expressing its continued dissatisfaction with the FAA conclusions.[12]

Petitioners do not ask the Supreme Court to resolve the disagreement between the FAA and EPA. Petitioners do urge, based on the reasoning in Marsh, supra, and upon proper application of the CEQ regulations,[13] that the FAA treat this single event noise data as new significant information that requires a supplemental EIS.[14]

---

[12] See EPA letter January 8, 1991 at Petitioners Court of Appeals Brief Addendum, B-71 to B-78.

[13] 40 CFR §1502.9(c).

[14] Perhaps the best indicator that the FAA abused its discretion by limiting noise impacts on humans to the 65 Ldn was revealed at oral argument when Judge Rosen questioned FAA council concerning single event noise with reference to a sonic boom. She answered, "A sonic boom may be something that

C. The Alternatives Analysis.

See the above discussion in Argument I concerning the evidence of record that alternatives exist that would meet the apparent transportation needs at costs equivalent to or less than the cost of the LAIP which do not destroy 4(f) protected resources. 42 U.S.C. §4332(C)(iii). This analysis also reveals a failure to meet the requirements under NEPA that the agency conduct a reasonably complete investigation of the environmental consequences of alternatives.[15]

D. The Needs Analysis.

See the discussion above in Statement of Case and in Argument I concerning the evidence of record on the need for an airport

---

one person finds terribly intrusive and another doesn't."

[15] Consideration of the environmental impacts of the other structural alternatives and the "no-build" alternative is clearly within the "bounded by some notions of feasibility" requirement. See Vermont Yankee, supra, at page 519.

expansion at Standiford Field at this time. The analysis of need for a project is an important part of both the 4(f) analysis and the NEPA analysis. Therefore the defects complained of above apply with equal weight in this Court's review of the adequacy of the agency's "hard look" at the major environmental impacts from the proposed action and the opportunities to mitigate or avoid such impacts.[16]

E. Transportation Analysis.

On page 14, the Court of Appeals approved the EIS discussion of transportation impacts by concluding that it was appropriate for the FAA to treat the Crittenden Drive as closed. In fact, the EIS does not analyze the Crittenden Drive as closed but postpones an analysis of the relocation of that road until a ten year period has elapsed. Only during subsequent briefing did the RAA

---

[16] Robertson, supra at 1846. "...EIS will discuss the extent to which adverse effects can be avoided."

suggest that in fact this road may be permanently closed. The impacts of that decision have never been analyzed as required by NEPA.

CONCLUSION

Utah Supreme Court Justice Daniel Stewart recently wrote concerning the Bill of Rights after 200 years as providing an effective barrier against a tyranny of the majority. The Supreme Court is the last resort for purposes of implementation of the Bill of Rights in order to provide protection against such tyranny. See Utah Bar Journal (June/July 1991) reprinted in Trial Magazine, October 1991.

Likewise, this Supreme Court is the court of last resort to make government account for its conclusions when it proposes to demolish homes, churches, businesses, neighborhoods, as well as parks and historic resources, or to engage in other activities that appear to propose significant adverse

impacts on those resources, all based on the government's conclusion concerning the "greater good."

If NEPA and 4(f) can help the parties to this dispute to find a less destructive way to meet the real public needs, then the community of Louisville is far better off and the current perception of tyranny by government will be, in part, remedied. Based on the foregoing, Petitioners respectfully petition for writ of certiorari to issue.

Respectfully submitted,

REEVES & GRADDY
110 North Court Street
P. O. Box 88
Versailles, KY 40383
(606) 873-1340

BY: _____
W. Henry Graddy IV
Robert E. Reeves
Todd Evan Leatherman